

HON. THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

A.M., by and through his parents and
guardians, B.M. and L.M., individually,
on behalf of VANCOUVER CLINIC
HEALTH BENEFIT PLAN and on behalf
of similarly situated individuals and
plans,

Plaintiff,

v.

MODA HEALTH PLAN, INC., an Oregon
corporation,

Defendant.

NO. 2:14-cv-1191 TSZ

PLAINTIFF'S UNOPPOSED
MOTION FOR FINAL APPROVAL
OF SETTLEMENT AGREEMENT

**NOTED FOR CONSIDERATION:
October 23, 2015**

Table of Contents

I.	INTRODUCTION.....	1
II.	EVIDENCE RELIED UPON.....	2
III.	FACTS	2
IV.	LAW AND ARGUMENT	3
A.	Legal Standards for the Approval of a Class Action Settlement Agreement.....	3
B.	The Factors Support Approval of the Settlement Agreement	4
1.	The Terms and Conditions of the Settlement Agreement	4
2.	Strength of Plaintiff’s Case	5
3.	No Objections to the Settlement Were Filed.....	6
4.	Risk, Expense and Duration of Further Litigation and Risk of Maintaining Class Action Status	7
5.	Stage of Discovery and Proceedings.....	7
6.	Views of Counsel	7
C.	Payment for Claims Administration.....	7
D.	Authorization of Attorneys’ Fees, Litigation Expenses and Incentive Awards.....	7
E.	<i>Cy Pres</i> Award and Additional Claims Administration	8
V.	CONCLUSION	8

I. INTRODUCTION

As a direct result of this case, Moda eliminated its outright exclusion of Applied Behavioral Analysis therapy (ABA) for its insureds with autism spectrum disorder (ASD). Dkt. No. 18 (Settlement Agreement), p. 27, ¶6. All of Moda's Washington insureds, including class representative A.M., now have access to this effective and medically necessary treatment. With no visit limits or caps, the ABA coverage criteria follows a "best practices" model for the delivery of ABA, informed by experts from the University of Washington's Autism Clinic and the Seattle Children's Autism Center. Dkt. No. 17, ¶ 15. These coverage criteria are now the standard for ABA coverage in Washington State and have been adopted by Premera, Regence, Group Health, Medicaid and the Public Employees health benefits plan, among others.¹ *Id.*

The breadth of the prospective relief in the Settlement Agreement alone is enough to warrant approval of the Settlement Agreement. But the Agreement provides more: Moda will also establish a \$250,000 fund to pay for retrospective claims, attorneys' fees, costs, notice and administration costs. Dkt. No. 16, p. 30, ¶7. This fund will be sufficient to pay all valid claims at 100%.² Spoonemore Decl., *Exh. A*. In fact, the claims administrator estimates that there will be over \$110,000 in *cy pres* funds available to

¹ These insurers only adopted ABA coverage after years of class action litigation brought by plaintiffs' counsel. *See, e.g., O.S.T. v. Regence BlueShield*, 181 Wn.2d 691, 335 P.3d 416 (2014).

² Given that the claims are not subject to copays, deductibles, or other costs sharing provisions, claimants are actually getting *more* than 100% of what their insurance policies would have paid.

1 distribute to “organizations to assist families with a family member with Autism to
 2 access health care and health coverage.” *Id.*; Dkt. No. 18, p. 32, ¶7.4.6.

3 Given all this relief provided to class members, it is not surprising that no class
 4 member opted out, and no class member objected to the Agreement. Spoonemore Decl.,
 5 *Exh. B.* Under any standard, the Settlement Agreement is “fundamentally fair, adequate
 6 and reasonable” and should be approved by the Court. *Class Plaintiffs v. Seattle*, 955 F.2d
 7 1268, 1276 (9th Cir. 1992) (“Although Rule 23(e) is silent respecting the standard by which
 8 a proposed settlement is to be evaluated, the ‘universally applied standard is whether
 9 the settlement is fundamentally fair, adequate and reasonable.’”).
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12 II. EVIDENCE RELIED UPON

13 This motion relies upon the Declaration of Richard E. Spoonemore in Support of
 14 Motion for Final Approval of Settlement Agreement, as well as the records and pleadings
 15 in this case. While Moda does not oppose this motion, it does not necessarily agree with
 16 the facts or legal conclusions alleged herein.
 17

18 III. FACTS³

19 Consistent with the Court’s Order preliminarily approving the Settlement
 20 Agreement, class notices were sent out to 83 current and past Moda households based
 21 on a mailing list of class members provided to the claims administrator by Moda.
 22 Spoonemore Decl., *Exh. A.* The mailing began on July 6, 2015 and concluded on July 8,
 23 2015. *Id.*
 24

25
 26 ³ The facts of this case were summarized in Plaintiff’s Motion for Preliminary Approval, Dkt. No. 18.

1 The notices informed Moda enrollees that if they were a member of one of the
 2 settlement classes, they must “opt out” by no later than September 18, 2015. No class
 3 member opted out. Spoonemore Decl., *Exh. B*. Class members were also informed that
 4 they could object to or comment on the proposed Settlement Agreement. No class
 5 member did so. Spoonemore Decl., *Exh. B*.

7 The Notices also informed Moda enrollees that class members must submit claims
 8 for reimbursement of APA therapy claims by no later than September 18, 2015.
 9 Nickerson & Associates, the claims processor agreed upon by the parties, received two
 10 claims with a total value of \$32,256.57, and has therefore concluded that there will be
 11 sufficient funds to pay all approved claims at 100%. *Id.*, *Exh. A*. The fund will be more
 12 than sufficient to pay (1) attorneys’ fees requested at \$87,500; (2) litigation costs of
 13 \$2,263.75; (3) incentive awards requested at \$10,000 for the named plaintiff; (4) the costs
 14 of administration; and (5) all claims at 100%. *Id.* In fact, over \$110,000 will be available
 15 for a *cy pres* distribution by the courts. *Id.*

18 IV. LAW AND ARGUMENT

19 A. Legal Standards for the Approval of a Class Action Settlement Agreement

20 Compromise of complex litigation is encouraged and favored by public policy. *In*
 21 *re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *In re Pac. Enters. Sec. Litig.*, 47
 22 F.3d 373, 378 (9th Cir. 1995). Federal Rule of Civil Procedure 23 governs the settlement
 23 of certified class actions and provides that “[a] class action shall not be dismissed or
 24 compromised without the approval of the court....” FRCP 23(e).
 25
 26

1 The standard is reasonableness, and the purpose is the protection of absent class
 2 members. *Officers for Justice v. Civil Service Comm'n.*, 688 F.2d 615, 623-26 (9th Cir. 1982);
 3 *Pickett v. Holland America Line-Westours, Inc.*, 145 Wn.2d 178, 188, 35 P.3d 351 (2001).
 4 These are evaluated under the following criteria: "the likelihood of success by plaintiffs;
 5 the amount of discovery or evidence, the settlement terms and conditions,
 6 recommendation and experience of counsel; future expense and likely duration of
 7 litigation, recommendation of neutral parties, if any; number of objectors and nature of
 8 objections; and the presence of good faith and the absence of collusion." *Id.* at 188-89.
 9 The purpose of the review is to ensure that class members are treated fairly and
 10 equitably. *Id.* at 189. Here, the factors weigh strongly in favor of approval.

13 **B. The Factors Support Approval of the Settlement Agreement**

14 **1. The Terms and Conditions of the Settlement Agreement**

15 As detailed above, under the Settlement Agreement, class members have
 16 obtained complete relief of their claims, additional resources to assist them and others
 17 with ASD with health insurance issues in the future, and payment of all attorneys' fees
 18 and costs. Class members did not compromise to obtain this outcome.

20 The parties extensively negotiated the amount of the Settlement Fund. The
 21 plaintiff retained an expert to conduct an actuarial analysis to determine the amount of
 22 anticipated claims. Now that the claims process has closed, it is clear that the Settlement
 23 Amount is sufficient to pay all of the claims filed by class members at 100% of their
 24 approved amount. Spoonmore Decl., *Exh. A*.

1 This is an extraordinary result. Common fund settlements where a cents-on-the-
 2 dollar recovery is obtained are often approved. *See Officers for Justice v. Civil Service Com.*,
 3 688 F.2d 615, 628 (9th Cir. 1982) (“It is well-settled law that a cash settlement amounting
 4 to only a fraction of the potential recovery will not *per se* render the settlement
 5 inadequate or unfair.”); *see, e.g., In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555
 6 (C.D. Cal. June 10, 2005) (approving a settlement fund that compensated class members
 7 at 36% of their losses). Here, not only will every approved claim be paid at 100%, but
 8 there will also be substantial funds remaining for *cy pres* distribution. *See Nachshin v.*
 9 *AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011) (the *cy pres* doctrine “allows a court to
 10 distribute unclaimed or non-distributable portions of a class action settlement fund to
 11 the next best class of beneficiaries.”). Where a settlement agreement results in payment
 12 of all claims submitted by class members at 100% **and** excess funds for a *cy pres* award,
 13 approval is clearly warranted. *See In re Netflix Privacy Litig.*, 2013 U.S. Dist. LEXIS 37286,
 14 *16 (N.D. Cal., Mar. 13, 2013) (approval granted where value of the Settlement
 15 Agreement exceeds the total claims that could be obtained in the absence of settlement).
 16

17 2. Strength of Plaintiff’s Case

18 The class’s case was quite strong. In settlement, the class obtained a clear process
 19 for speedy reimbursement and undisputed prospective relief. Indeed, the prospective
 20 coverage for ABA, which defines exactly how ABA must be covered, likely exceeds what
 21 plaintiff could have obtained at trial. The settlement appropriately reflects the strength
 22 of plaintiff’s case.
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3. No Objections to the Settlement Were Filed

The reaction of class members is an important consideration. “[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms ... are favorable to class members.” *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2007). “In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.” *Nat’l Rural Telecom. Coop, v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) (quoting 4 A. Conte & H. Newberg, *NEWBERG ON CLASS ACTIONS*, § 11:50 at 155 (4th ed. 2002)). The absence of objections establishes a strong presumption in favor of approval. *Id.* at 529. Where, as here, the class is “nearly silent” regarding the terms of the settlement agreement, “the lack of objection of the Class Members favors approval of the Settlement Agreement.” *In re Omnivision Techs.*, 559 F. Supp. 2d at 1043 (3 objectors appeared out of 57,630 potential class members); *see, e.g., Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 577 (9th Cir. 2004) (45 objections out of 90,000 notices sent); *Rodriguez v. West Publ. Corp.*, 2007 U.S. Dist. LEXIS 74767, at *33 (C.D. Cal. Sept. 10, 2007) (54 objections out of 376,000 notices).

No objections were received in this case. This is remarkable, and strongly supports approval.

1 **4. Risk, Expense and Duration of Further Litigation and Risk of**
 2 **Maintaining Class Action Status**

3 This lawsuit was filed in 2014 following a series of other cases filed against
 4 Washington's insurers. All of the early cases were heavily litigated, and this case could
 5 have followed the same pattern.

6 **5. Stage of Discovery and Proceedings**

7 This case was resolved early. Extensive discovery was not required to evaluate
 8 the legality of Moda's ABA exclusion. Moda, to its credit, worked in good faith to resolve
 9 this case without years of costly litigation.
 10

11 **6. Views of Counsel**

12 Class counsel strongly supports the Settlement Agreement. From every angle,
 13 this Settlement Agreement is an excellent result for class members. The Settlement
 14 Agreement should be finally approved.
 15

16 **C. Payment for Claims Administration**

17 If the Court approves the Settlement Agreement, it should also approve the
 18 payment from the Settlement Fund for the costs of claims administration that class
 19 counsel have personally advanced. Those costs currently total \$4,860. Spoonemore
 20 Decl., *Exh. C* (website \$96, Nickerson & Associates \$4,364 paid plus \$400 to be paid).
 21

22 **D. Authorization of Attorneys' Fees, Litigation Expenses and Incentive**
 23 **Awards**

24 Class counsel will file its reply brief in support of its Motion for Attorneys' Fees,
 25 Expenses and Incentive Awards on or before October 19, 2015 and will post the reply
 26 briefing on its website at the same time. In addition to seeking final approval of the

1 Settlement Agreement, class counsel will ask that this Court authorize payment of
 2 attorneys' fees, litigation expenses and incentive awards at the final approval hearing.

3 **E. Cy Pres Award and Additional Claims Administration**

4 Given the existence of *cy pres* funds, a hearing to direct the payment of those funds
 5 will need to be set in the future. Class counsel's proposed order directs class counsel to
 6 contact the Court for a hearing date after claims processing has concluded. Prior to the
 7 *cy pres* hearing, class counsel will confer with Moda's counsel in an attempt to reach
 8 agreement on (1) finalizing the exact amount available for *cy pres* distribution; (2) a
 9 distribution proposal(s); and (3) reporting to the Court regarding an agreed-upon
 10 proposed *cy pres* distribution and/or presenting competing proposals for *cy pres*
 11 distribution to the Court. At the time of the *cy pres* hearing, class counsel will also report
 12 on the disbursement of settlement funds, including any additional costs for Claims
 13 Administration.
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17 **V. CONCLUSION**

18 Plaintiff, on behalf of the class, respectfully requests that the Court:

- 19 (a) finally approve the Settlement Agreement;
- 20 (b) authorize the disbursement of settlement funds to pay approved claims,
 21 claims administration fees and expenses, attorneys' fees, litigation costs, and incentive
 22 awards, consistent with the approved Settlement Agreement and as authorized by the
 23 Court in response to class counsel's Motion for Attorneys' Fees, etc.; and
 24
 25
 26

1 (c) schedule a hearing date and briefing schedule for approval of the *cy pres*
2 distribution.

3 DATED: October 8, 2015.

4
5 SIRIANNI YOUTZ
6 SPOONEMORE HAMBURGER

7 /s/ Richard E. Spoonemore

8 Richard E. Spoonemore (WSBA #21833)

9 Eleanor Hamburger (WSBA #26478)

10 rspoonemore@sylaw.com ♦ ehamburger@sylaw.com

11 Attorneys for Plaintiff
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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2015, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

- **J. Will Eidson**
jweidson@stoel.com, sea_ps@stoel.com, docketclerk@stoel.com,
cmcastro@stoel.com
- **Eleanor Hamburger**
ehamburger@sylaw.com, matt@sylaw.com, theresa@sylaw.com
- **Maren Roxanne Norton**
mrnorton@stoel.com, sea_ps@stoel.com, shannon.liberio@stoel.com,
docketclerk@stoel.com, heidi.wilder@stoel.com
- **Richard E Spoonemore**
rspoone@sylaw.com, matt@sylaw.com, rspoone@hotmail.com,
theresa@sylaw.com

DATED: October 8, 2015, at Seattle, Washington.

/s/ Richard E. Spoonemore
Richard E. Spoonemore (WSBA #21833)